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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

PETITION NOT PRINTED

RESPONSE NOT PRINTED

No. 249

REPLY BRIEF NOT PRINTED

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LEMON BARLOW, *et al.*,

Petitioners,

vs.

B. L. COLLINS, as State Executive Director of the Alabama Agricultural Stabilization and Conservation Services; HORACE GODFREY, as Administrator of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture; and ORVILLE L. FREEMAN, as Secretary of the United States Department of Agriculture,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' BRIEF

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' BRIEF

Opinions Below

The opinion of the United States Circuit Court of Appeals (A. 63-69) is reported at 398 F.2d 398 (1968).

The opinion of the United States District Court for the Middle District of Alabama (A. 51-55) is unreported.

Jurisdiction

The judgment of the Fifth Circuit Court of Appeals was entered on July 16, 1968 (A. 70-71). An order granting an extension of time within which to file this Petition for Certiorari was signed by Mr. Justice Black on October 13, 1968, extending said time to and including December 13, 1968. The petition was filed in this Court on December 13, 1968, and certiorari and leave to proceed *in forma pauperis* were granted on June 16, 1969. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§1331, 1337, 1343, 1346, 1361, 2201 and 2202; 42 U.S.C. §1981 *et seq.* and the Civil Rights Act of 1964. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutes and Regulations Involved

The pertinent portions of Section 402 of the Food and Agriculture Act of 1965, 79 Stat. 1194, 7 U.S.C. §1444; Section 8g of the Soil Conservation and Domestic Allotment Act, 52 Stat. 35, 205, as amended, 16 U.S.C. §590h(g); United States Department of Agriculture Bulletin, "Instructions Relating to Assignment"; 20 Fed. Reg. 6511 (1955), as amended 31 Fed. Reg. 2815 (Feb. 17, 1966), are set forth in Exhibit A at pp. 43-45.

Questions Presented

1. Do petitioner-tenant farmers receiving land diversion and price support payments under the Food and Agriculture Act of 1965, 7 U.S.C. §1444, have standing to challenge a regulation promulgated under the Act denying them the protections of a long-standing statutory restriction on the assignability of benefits to landowners intended for their benefit.

2. May the Secretary of Agriculture abrogate such statutory restrictions protecting tenant farmers by repealing a 27-year old explicit prohibition in the regulation against assignments to landowners and promulgating a regulation endorsing such assignments, particularly where Congress incorporated the statutory restriction and the regulations under it before the repeal and endorsement.

Statement of the Case

This case involves a challenge to amended regulations issued by the Secretary of Agriculture which broaden the power of tenant farmers to assign land diversion payments made to them under the authority of §402(a) of the Food and Agriculture Act of 1965, 7 U.S.C. §1444(d)(13), 79 Stat. 1194. The Food and Agriculture Act of 1965 is omnibus legislation which, *inter alia,* establishes price support levels and soil diversion payments for various crop programs. Section 1444(d) prescribes price support and diversion payments for the Upland Cotton Program for the crop years through 1970.* A farmer may be eligible for price

* The statute authorizes such payments through the 1969 crop year, but it has recently been extended through 1970. Pub. Law 90-559, 80 Stat. 996 (Oct. 11, 1968).

support payments if he is "a producer on whose farm the acreage planted to the commodity does not exceed the farm acreage allotment for the commodity. . . ." 7 U.S.C. §1428 (b). In the Upland Cotton Program a farmer may qualify for acreage diversion payments by diverting "a portion of [his] cotton acreage allotment from the production of cotton to approved conservation practices to the extent prescribed by the Secretary. . . ." 7 U.S.C. §1444(d)(4). The Act makes special provision for the economic rights of small farmers who are tenants or sharecroppers by directing the Secretary to create "adequate safeguards to protect the interests of tenants and sharecroppers" and to "provide for the sharing of price support and diversion payments among producers on the farm on the basis of their respective shares in the cotton crop produced on the farm, or the proceeds therefrom, . . ." 7 U.S.C. §1444(d)(10).

Another special provision for small farmers is a limited right of assignment of payments. These assignments, like acreage allotments, are administered on the local level (usually the county) by the Agricultural Stabilization and Conservation Service (ASCS), an agency within the United States Department of Agriculture. 7 U.S.C. §§1421(a), 1444(d); 16 U.S.C. §590h(b). The county ASCS committee is authorized to process and enforce the assignment of payments only where the assignment is made for certain prescribed purposes. 7 U.S.C. §1444(d)(13); 7 C.F.R. 709. If the payment is assigned but the assignment is for improper purposes or not in conformity with the prescribed procedure, the payment is made directly to the producer. If the assignment is proper, however, it is recorded with the county committee and the federal agency; payment to the extent of the assignment is made directly to the as-

signee. Farmers may make only one assignment during the crop year.

At issue here is the extent of the limitation which Congress placed on the purposes for which the assignment may be made. Petitioners are tenant farmers growing cotton in Alabama who are required by their landlord, as a condition of continued tenancy, to assign to him their payments for the purpose of securing payment of cash rent. The assignment of payments for this purpose had been forbidden in the applicable regulation for a number of years and was authorized for the first time by an amendment of the assignment regulation issued February 17, 1966. 31 Fed. Reg. 2815 (1966) as amended, 7 C.F.R. §709.3. The particular issue here is whether Congress gave the Secretary authority to so expand the assignability of payments and whether ASCS may approve and process an assignment made for the purpose of securing cash rent for a farm.

The answer to this question lies in the interpretation of 7 U.S.C. §1444(d)(13), and 16 U.S.C. §590h(g), which in combination place strict and specific limits on the assignability of payments. Section 1444(d)(13) of 7 U.S.C., a provision under the Upland Cotton Program enacted by the Food and Agriculture Act of 1965, provides that:

> The provisions of section 590h(g) of Title 16 (relating to the assignment of payments) shall also apply to payments under this [program].

Turning to the "provisions" of 16 U.S.C. §590h(g), as amended, 52 Stat. 35, 205, we find:

> A payment which may be made to a farmer under this section may be assigned, without discount, by him in writing *as security for cash or advances to finance making a crop* . . . [emphasis added]

The statutory phrase delineating the boundary of permissible and effective assignability—"security for cash or advances to finance making a crop"—was unmistakably spelled out in the Secretary's regulations when in 1965 Congress incorporated the right of assignment in the Upland Cotton Program. Since the enactment of Section 590h(g) in 1938, the Secretary's published construction of the phrase had limited assignability:

> . . . (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (b) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. *Nothing contained herein shall be construed to authorize an assignment given to secure* the payment of the whole or any part of the purchase price of a farm or *the payment of the whole or any part of a cash or fixed commodity rent for a farm.*
>
> 20 Fed. Reg. 6511 (1955) [emphasis added]

Congress granted the right of assignment to cotton farmers in the same terms as those by which it had been limited for twenty-eight years: assignability did not extend to security for purchase or rental payments for a farm, and ASCS could not approve such payments.

In early 1966, however, the Secretary decided that the statute warranted his narrowing the limitation on assignments. He reversed his previous position regarding cash rent by deleting the prohibition of assignment for cash rent and expanding his interpretation of "making a crop" to include:

> . . . the payment of cash rent for land used (for planting, cultivating or harvesting).
>
> 31 Fed. 2815 (1966)

This case challenges the legality under the Food and Agriculture Act of 1965 of the Secretary's new, 1966 interpretation of "making a crop."

The practical effect of the Secretary's *volte-face* is to deprive tenant farmers of the use of the purchasing power that is available to them by virtue of their right to assign future benefits under the Upland Cotton Program. In the past, Petitioners were required by landowners to execute rent notes as security for the cash rent of the land they worked (A. 7). The note operated as a lien on the crop and farm equipment owned by Petitioners until the rent was paid. Because tenants had no money to pay rent until the crop was in, there was nothing the landowner could do but continue, as had been done for generations past, to get his rent at the end of the crop year. But as a result of the tenant farmer's own lack of funds and credit, he was held in virtual bondage by the necessity of getting groceries and supplies needed to make his crop from the landowner. These were supplied at high prices and high interest rates which exhausted Petitioners' profits at the end of the year.

The right to assign payments under the Upland Cotton Program, however, affords Petitioners a new source of

credit to finance their day to day expenses of "making a crop." * As a result, tenant farmers attain some measure of independence from their landlords by purchasing with cash or their expanded credit resources their supplies and necessities at lower competitive prices. Federal regulations issued pursuant to 7 U.S.C. §1444(d)(10), *supra*, would prohibit any direct landowner attempt to subvert this new opportunity. If, on the other hand, Petitioners may effectively make an assignment for rent their landlords will force them to do so by replacing them with other tenants if they refuse. This is not prohibited if the assignment is permissible. Once having assigned for rent, however, tenants are left, as before, subject to the landowner's power to manipulate prices and credit terms to his advantage. Tenant farmers are kept living at subsistence, without the modest measure of economic independence afforded by their power of assignability.

This suit was brought in the District Court for the Middle District of Alabama. The complaint asserted three separate claims, only the first of which sought relief against Respondents herein** (A. 3). The District Judge dismissed this claim on two grounds: that Petitioners did not have standing to challenge the 1966 regulation (A. 52-53) and, alternatively, that the Secretary's 1966 interpretation of

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* Thus in the Upland Cotton Program in 1968 there was widespread use of this assignment power by farmers with yearly incomes of between $1,000 and $2,000. Respondents' Brief in Opposition, p. 8, n. 5.

** The other claims charge that Petitioners' landlord unlawfully interfered with their right to receive subsidy payments under the federal program and unlawfully caused their eviction because of participation in litigation concerning the program. These claims were transferred for trial to the Northern Division of the District Court for the Southern District of Alabama.

the statutory language was permissible (A. 53-54). On appeal to the Fifth Circuit, that Court affirmed, Judge Tuttle dissenting, on the grounds that Petitioners lacked standing to challenge the regulation. 398 F.2d 398 (5th Cir. 1968) (A. 63-69). This Court granted a writ of certiorari on June 16, 1969 (A. 71).

Summary of Argument

I

The courts below erred in their determination that Petitioners lack standing to challenge the reversal by the Secretary of Agriculture of his long-standing administrative construction that payment for cash rent for land is not comprehended by the statutory phrase "making a crop," and therefore that assignments could not be made for that purpose.

In determining that Petitioners lack standing, the Fifth Circuit applied a test of standing which is manifestly inadequate in light of recent decisions both of this Court and other Courts of Appeals. Standing need not be predicated upon the existence of the traditional "legally protected interest," but rather may be established by actual economic injury together with the claim of Congressional intent to protect the plaintiff's class from such injury. *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968).

It is clear that Petitioners are the intended beneficiaries of 7 U.S.C. §1444(d)(13) and 16 U.S.C. §590h(g). These two statutes, as exceptions to the generally applicable

statute, 31 U.S.C. §203, were intended to benefit tenant farmers in the Upland Cotton Program by providing them with additional means of securing credit to finance their farming operations.

II

The recently-changed regulation of the Secretary of Agriculture which permits assignment of cash rent for land is invalid and unauthorized by law in that it exceeds the statutory authority given to the Secretary.

A regulation which is in excess of statutory authority is invalid. As demonstrated in Part I, Congress intended that the phrase "making a crop" limit the Secretary's authorization of assignments in the Upland Cotton Program. As the payment of cash rent for agricultural land is not within the Congressional intendment of "making a crop," the Secretary's amendment of the regulation cannot stand.

The term "making a crop" is not broad statutory language, nor is it a phrase of common English usage which is susceptible to many variations in application. Rather it is a term of narrow signification limited by judicial and administrative construction of long standing.

The history of §590h(g) and the regulations thereunder demonstrate that Congress intended to prohibit assignments for cash rent of land. The administrative construction of the "making a crop" language for twenty-seven years reflected this prohibition. In addition, the technical agricultural definition demonstrates that the phrase "making a crop" deals with the farmer in the field growing his crop, not negotiating for his farm.

Nothing whatever suggests that by re-incorporating the "making a crop" assignment limitation in the Upland Cotton Program in 1965, Congress intended this language to serve different purposes than §590h(g), or that "making a crop" was to have a different meaning. Congress recognized, approved and adopted the Secretary's twenty-seven year construction of "making a crop" by enacting in another context the legislation in question. This Congressional ratification test of intent is perfectly consistent with Congressional policy, which is that of benevolence towards small farmers.

Nor does the November 1966 amendment to §590h(g) indicate otherwise. That amendment was a mere technical amendment, dealing only with simplification of the manner of making an assignment. There is no indication in the legislative history that Congress was aware of the Secretary's recent change in the regulation, or that the Secretary submitted for Congressional consideration that change, despite evidence of controversy over its validity. Thus Congress did not ratify the regulatory change.

Congress did not give the Secretary any broad power to create what he thinks is a fair balance between the competing interests of tenants and landowners as regards assignments. The assignment right and its limitations were intended solely for the benefit of small farmers. The Secretary may not redefine it to expose them to the very risks Congress guarded against.

ARGUMENT

I.

Petitioners Have Standing to Maintain This Action.

The Anti-Assignment Act, 31 U.S.C. §203, renders null and void any assignment of claims against the United States Government. Section 402 of the Food and Agriculture Act of 1965, 7 U.S.C. §1444(d)(13) (Supp. III), the meaning of which is at issue here, creates a limited exception to this rule in behalf of cotton farmers by making applicable to the Upland Cotton Program, 7 U.S.C. §1444 (d) (Supp. III), the "provisions" of §8g of the Soil Conservation and Domestic Allotment Act, 52 Stat. 35, 205, as amended, 16 U.S.C. §590h(g) (Supp. III). That section now provides in relevant part:

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing *as security for cash or advances to finance making a crop,* handling or marketing an agricultural commodity, or performing a conservation practice . . . .

As set out in the Statement of the Case, the substantive issue here is whether the Secretary, in 1966, erred by reversing his long-standing construction that payment of cash rent for land was not comprehended by the phrase "making a crop," and therefore that assignments could not be made for that purpose. The District Court and the Fifth Circuit held that Petitioners did not have standing to raise the issue. That determination was erroneous.

A. The Court Below Applied an Incorrect Test of Standing.

In determining that the Petitioners in this action lacked standing, the Court of Appeals for the Fifth Circuit applied a test of standing which is manifestly inadequate in the light of recent decisions both of this Court and other Courts of Appeals.

There has been a persistent tendency in the law of standing, especially as applied to benefit programs creating or protecting interests, to require that standing be predicated either upon specific statutory language conferring standing or upon the existence of a more or less traditional "legally protected interest." The majority opinion below clearly follows such reasoning:

> "Thus, in the absence of an express or implied statutory grant of standing, mere economic harm to an appellant 'made possible by government action (even if allegedly illegal) does not give standing to sue to restrain such action.'"
>
> citing and quoting from *REA* v. *Central La. Elec. Co.*, 354 F.2d 859, 863 (5th Cir. 1966), *cert. denied* 385 U.S. 964 (A. 65).

The Court below further states:

> "However, a policy of protecting a class of persons does not, without more, grant a legal right to those persons to enforce the policy" (A. 65).

This restrictive test of standing has also been sporadically applied in challenges to urban renewal relocation. See *Green St. Assoc.* v. *Daley*, 373 F.2d 1 (7th Cir.), *cert. de-*

nied, 387 U.S. 932 (1967), and *Johnson* v. *Redevelopment Agency,* 317 F.2d 872 (9th Cir.), *cert. denied,* 375 U.S. 915 (1963).

However, the holding of this Court in *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 (1968) has put to rest any such restrictive notion of standing. Indeed, Respondents have admitted as much in their Brief in Opposition to the Petition for Certiorari:

> "We agree with petitioners that the test of standing here is that applied by this Court in *Hardin* v. *Kentucky Utilities Co.,* 390 U.S. 1 and by the Second Circuit in *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920."
>
> Respondents' Brief in Opposition, pp. 10-11.

Since the test of standing cannot be altered by agreement of the parties, and since restrictive notions of standing are still asserted and accepted in the lower courts, Petitioners shall briefly state the argument and authority for a broad test of standing in this case despite the apparent concession of the point by Respondents.

In *Hardin, supra,* this Court held that a private utility company had standing to assert competitive injury where the intent of Congress was to protect the private utilities from such competition. The *Hardin* holding is virtually in direct conflict with *REA* v. *Central La. Elec. Co.,* 354 F.2d 859 (5th Cir. 1966), *cert. denied,* 385 U.S. 815, upon which much of the reasoning of the Fifth Circuit in the instant case rests. In effect, *Hardin* may be taken to establish that economic injury in fact together with the claim of Congressional intent to protect the plaintiff's class from such injury is sufficient to establish standing.

Recent cases in the Court of Appeals for the District of Columbia Circuit have adopted just such a broad standing doctrine. Thus, in *Broadcast Enterprise Inc.* v. *FCC,* 390 F.2d 483 (D.C. Cir. 1968), that Court upheld the standing of one licensee to contest the assignment of a license to a more dangerous competitor. Further, in *Curran* v. *Clifford,* No. 21040 (D.C. Cir. Dec. 22, 1968), the Court upheld the standing of the National Maritime Union and its members to challenge alleged violations of 10 U.S.C. §2631 requiring that "only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies" bought for the United States armed forces. While the *Curran* court was divided on the issue of whether the matter was reviewable or had been committed to agency discretion, it was unanimous on the issue of standing.

The Second Circuit has been equally forceful in *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (2nd Cir. 1968), holding that displaced families have standing to challenge an alleged failure to make adequate relocation provisions and an alleged discriminatory renewal scheme. See also *Western Addition Community Organization* v. *Weaver,* 294 F. Supp. 433 (D.C. Cal. 1968).

All of these cases rest upon a rule of law which upholds the standing of a plaintiff who is in fact harmed by administrative action if there is evidence of a Congressional intent to protect the class to which the plaintiff belongs. This test is urged by the leading scholars in Administrative Law. See K. Davis, Administrative Law Treatise §22.02 at 213; L. Jaffe, Judicial Control of Administrative Action 336 (1965).

This issue does not involve "standing" in the sense of the constitutional requirement that there be an actual "con-

troversy." See, *e.g., Flast* v. *Cohen,* 392 U.S. 83 (1968). Nor does it involve whether the Petitioners are the best possible among several alternative classes to bring the action. See, *e.g., Office of Communication of the United Church of Christ* v. *F.C.C.,* 359 F.2d 994 (D.C. Cir. 1966). There is no question of injury in fact from the challenged administrative action. In these circumstances standing to sue is really a question of reviewability *vel non.* See, Jaffe, *supra,* at 336. There exists a strong presumption that administrative action affecting the interests of individuals or groups is reviewable. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967).

The narrow test requiring that the interest invaded must be of "a recognized character at 'common law' or a substantive private legally protected interest created by statute," *Associated Industries* v. *Ickes,* 134 F.2d 694, 700 (2d Cir. 1943), *cert. granted,* 319 U.S. 739, *vacated as moot,* 320 U.S. 707, is not only initially question begging; it ignores that a growing number of federal statutes are intended to create and protect new interests, particularly of economically vulnerable or disadvantaged citizens. In these circumstances it is important for trial courts to know the circumstances in which the intended beneficiaries of these programs may challenge administrative action as beyond the scope of statutory authorization. A realistic examination of the intent of Congress to protect such persons provides a meaningful resolution of this question. It also preserves an effective opportunity to be heard. The test applied by the Court of Appeals below was clearly incorrect.

B. Plaintiffs Are Intended Beneficiaries of 7 U.S.C. §1444(d)(13) and 16 U.S.C. §590h(g).

Although the Court below denied standing on the basis of a very narrow test for determining whether standing exists, Respondents have defended the decision below while embracing a broader rule of law. In effect, the Respondents have asserted that Congress did not intend to protect persons in the class of the Petitioners herein through 7 U.S.C. §1444(d)(13). Respondents' Brief in Opposition, p. 12. This section of Petitioners' brief demonstrates that the protection of tenants and sharecroppers was the primary purpose of this section and that whatever the decision on the merits, such a broad intent to protect suffices to confer standing.

1. Plainly Section 7 U.S.C. §1444(d)(13), and before it, 16 U.S.C. §590h(g), were intended to benefit Petitioners by creating an exception in their behalf to the generally applicable statute, 31 U.S.C. §203, prohibiting all assignments of claims against the Government. As stated by the then Secretary of Agriculture Charles Brannan, in conjunction with legislation which would have repealed 16 U.S.C. §590h(g), that assignment provision "was enacted for the purpose of creating additional credit to farmers to assist them in financing farming operations . . . and was used principally by tenants and sharecroppers. . . ." Letter to the President of the Senate, January 21, 1952, S. Rep. No. 1305 (1952). The same goal of creating credit resources for small producers underlay Congress's action in making the "provisions" of 16 U.S.C. §590h(g) applicable in the Upland Cotton Program by 7 U.S.C. §1444(d)(13). With cash from assignments, small tenant and sharecropping farmers

can tide themselves over lean years, finance their crop, and, equally as important, avoid the high prices and interest rates they would incur by purchasing on credit at stores maintained by their landlords, who are their only other source of credit.

As 7 U.S.C. §1444(d)(13) is designed directly to benefit Petitioners and no one else, they have, under *Hardin*, standing to challenge any administrative construction of the statute which is detrimental to their interests, regardless of whether that construction cuts back their Congressionally granted assignment power or, as here, expands it in a manner that renders them potential victims of those upon whom they are economically dependent. Either may equally undermine the limited power granted to them. All that is relevant for standing is that the challenged administrative action be in fact detrimental to their interests. To hold otherwise would be in derogation of the well-settled principle that administrative action is not to be deemed unreviewable in the absence of an express Congressional statement of an intention to make it so. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Harmon* v. *Brucker*, 355 U.S. 579 (1958). Clearly, no one other than Petitioners has standing to raise the substantive problem at issue herein.

2. Petitioners thus submit that it suffices to create standing that the general statutory provision in question was intended for their, and only for their, benefit. There is no need, for standing purposes, to parse the statutory language to ascertain whether the particular clause in question was intended for their benefit. However, even if this be thought required, it is clear beyond a peradventure that the

limitations imposed upon Petitioners' assignment powers were intended for their benefit, and not, as Respondents suggest (Respondents' Brief in Opposition, p. 12, n. 8) as a balance between the Government's anti-assignment policies and farmers' needs.

Since the early New Deal, the federal government has sought to protect farmers' income both by limiting the supply of commodities produced and by supporting the prices at which they are sold. A persistent problem has been to devise some means to assure that the federal monies paid out help those farmers who are in need, rather than subsidize the already well-to-do.* While this problem is national in scope, it has always been particularly acute where, as in cotton farming, the small producer typically does not own his own land. Because he rents it or works it as a sharecropper he is, absent legal protection, at the mercy of the landowner's power to manipulate the terms of rent and credit for production loans so as to take from him the federal benefits ostensibly provided. In some cases it may even pay the landowner to evict tenants and sharecroppers.

As enacted, the Agricultural Adjustment Act of 1932 provided virtually no protection for these small cotton pro-

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* Westfall, *Agricultural Allotments as Property*, 79 Harv. L. Rev. 1180, 1204 (1966): "Even where allotments are generally believed to work best—in increasing the incomes of deserving agricultural producers—reality falls far short of the ideal. Indeed, incomes are increased, and by substantial amounts—but the increases flow largely to landowners because allotments are tied to land. The prevailing view of economists is that allotments have only a minor effect in increasing the returns for the human efforts that are involved in the production of allotted crops. The benefits have been capitalized in land values, without a comparable improvement in the economic position of non-landowning farm operators and farm workers." (Footnotes omitted.)

ducers. Ninety percent of the government payments went to landowners, Schlessinger, *The Coming of the New Deal* 77 (1958). Eviction of tenants and sharecroppers was also widespread under the impetus of the federal subsidy program. D. Conrad, *The Forgotten Farmers* 64-82, 201-09 (1965). Concern over this situation was expressed in Congress as early as 1934. 78 Cong. Rec. 4203 (1934) (Remarks of Rep. McGugin).* The Bankhead Cotton Control Act §15(b), 48 Stat. 598, 605 (1934), empowered the Secretary of Agriculture to "make regulations protecting the interest of sharecroppers and tenants." Far greater protection for tenants was provided by §§8(e) and (f) of the Soil Conservation and Domestic Allotment Act, as amended 16 U.S.C. §§590h(e), (f) (1964), which protections were enacted at the same time as was §8g, the assignment provision. All three provisions were part of §103 (entitled TENANT PROVISIONS) of the Agricultural Adjustment Act of 1938, 52 Stat. 35. Similarly, in the 1965 Food and Agriculture Act Congress included a provision in the Upland Cotton Program protecting the interests of tenants and sharecroppers in cotton diversion payments, 7 U.S.C. §1444(d)(10) (Supp. III). Pursuant to this section, the Secretary has issued regulations generally designed to protect tenants. 7 C.F.F. 722.817, 794.

A conference report, issued in relation to the now defunct Soil Bank Program, fairly states the Congressional attitude:

> No single problem connected with the proposed soil bank program had caused the committee more concern

* "[I]n the granting of the allotment checks, in great sections of the South, the tenants did not get their share of the checks. They were held out for debt, and now they are cast into unemployment and distress." 78 Cong. Rec. at 4203.

> than that of guaranteeing adequate protection of tenants and sharecroppers under the program.
>
> Conference Report on H.R. 12, 84th Cong. 2d Sess., n. 7.

In this program too Congress required for tenants "such provision as may be necessary to prevent them from being forced off the farm." Act of May 28, 1956, 70 Stat. 197.

It is against this backdrop of pervasive federal concern for the plight of tenant and sharecropping farmers that the purposes of limited assignments must be assessed. We start with §8g of the Soil Conservation and Domestic Allotment Act, the statute which 7 U.S.C. §1444(d)(13) incorporates by reference. Section 8g, as amended 16 U.S.C. §590h(g) was offered on the floor of the House in 1937 by Representative Fulmer of South Carolina as a committee amendment to the then pending amendments to the Soil Conservation and Domestic Allotment Act. 82 Cong. Rec. 844. The assignment right was necessary to generate credit for poor tenant and sharecropping farmers. As passed by the House, it permitted assignments, but *only* to landlords. Representative Fulmer recognized that "this may give the landlord an opportunity to gyp his tenants or sharecroppers," but he thought speculators were likely to be even less solicitous of tenants' welfare. When a similar amendment was twice offered in the Senate, it was twice rejected because it provided insufficient protections for the poor farmer. 82 Cong. Rec. 1755-1756, 1766 (1937). As finally enacted, §8g was a compromise effected in conference. It enabled farmers to make assignments but it imposed three limitations: the assignment must be "to finance making a crop" (a term of art as we shall see in Part II herein); it

could not pay or secure pre-existing indebtedness; and it must be made without discount. The Respondents, while admitting that "all three limitations were stressed by the Managers on the part of the House in their report," H.R. Rep. No. 1767, 75th Cong., 3d Sess. 60 (1938) suggest that "no explanation is given." Respondents' Brief in Opposition, p. 11, n. 7.

What explanation is needed when the import of Congresssional action is plain on its face? That §8(g) creates a beneficial exception to a general federal policy of no assignments is obvious. The only doubts as to the wisdom of creating this exception went to whether it would do more harm than good in the long run because of speculators and greedy landowners. These fears were met by a compromise solution imposing three restrictions, each of which is designed to protect the tenant both from his own improvidence and from his economic vulnerability. Plainly, the limits on assignments as well as the basic right to assign are designed and intended to protect Petitioners, just as are the restrictions in a spendthrift trust. This was recognized by successive Secretaries of Agriculture who, until 1966, construed the statutory language "making a crop" to protect small farmers against landowners' demands for assignments to pay rent. U.S. Dept. of Agriculture, "Instructions Relating to Assignments"; 20 Fed. Reg. 6511, 6512 (1955).

This then was the situation when §402 of the Food and Agriculture Act of 1965 was enacted. The part of that section at issue here, 7 U.S.C. §1444(d)(13) does not attack the assignment problem afresh but simply incorporates §8(g):

> "The provisions of Subsection 8(g) of the Soil Conservation and Domestic Allotment Act, as amended

(relating to assignment of payments), shall also apply to payments under this subsection."

Respondents apparently take the position that while §8(g) might be designed to protect Peitioners, there is no "conclusive" evidence that 7 U.S.C. §1444(d)(13) was enacted to serve the same purpose. Respondents' Brief in Opposition, pp. 11-12. Plainly to require such conclusive evidence would be a perversion of the principles of statutory construction. The very fact that Congress incorporates one provision of the law into another demonstrates confidence that the purposes of new law will be well served by application of the old. Is §8(g) to be construed in one manner, and 7 U.S.C. §1444(d)(13) in another? If Respondents' position were accepted no one would have standing to sue unless Congress dealt with all manner of situations and spelled out the objects of its bounty in far more detail than is its wont.

II.

The Challenged Regulation Is Invalid and Unauthorized by Law in That It Exceeds the Statutory Authority Given to Defendants.

A. A Regulation Which Is in Excess of Statutory Authority Is Invalid.

On the merits, the question herein is whether Congress intended by enacting 7 U.S.C §1444(d)(13) in 1965 to authorize the Secretary to promulgate regulations providing for the assignment of diversion payments to secure payment of cash rent for land to be used in producing a crop. Ascertainment of Congressional intent focuses on the

question of what Congress meant by the phrase "to finance making a crop." As we have seen, Congress used this phrase to limit the Secretary's authorization in the Upland Cotton Program by making §8(g) of the Soil Conservation and Domestic Allotment Act, 16 U.S.C. §590h(g), applicable to that program. Therefore unless the payment of cash rent for agricultural land is within the Congressional intendment of "making a crop," the Secretary's amendment of the regulation cannot stand.

It may be useful briefly to state again why the issue is important to Petitioners. It boils down to who gets the cash or purchasing power generated by assignments during the making of a crop. If a tenant farmer has the power to assign his federal entitlements for rent, then the landowner from whom he rents can effectively force him to do so. If he refuses, he will, as have several Petitioners herein, be thrown off the land and replaced by another more pliant poor farmer (A. 8). But by assigning away his federal benefits, he loses his only realistic source of credit other than the landowner himself. From then on, he has to buy his food and tools at the landowner's store, typically at prices and interest rates leaving him no profit at the end of the crop season. If on the other hand he simply cannot get cash to pay rent, and no one else in the community can either, there is no practical alternative for the landowner but to maintain the traditional practice of collecting rent, which cannot be quickly increased under federal regulations, 7 C.F.R. §722.817, at the end of the season.

In defining the term "to finance making a crop," the Secretary must act within the limits of his statutory authorization. He cannot issue regulations applying the terms of the statute that exceed the limits of that author-

ity. *Miller* v. *United States,* 249 U.S. 435, 440 (1935); *Campbell* v. *Galeno Chemical Co.,* 281 U.S. 599, 610 (1930). The extent of his authority is necessarily a matter for the determination of the court, not of the administrator himself. *Addison* v. *Holly Hill Fruit Co.,* 322 U.S. 607, 616 (1944). This is particularly so here.

Where Congress delegates administrative authority to promulgate regulations affecting individuals or groups, the exercise of administrative judgment is generally preceded by a rulemaking hearing, at which the persons affected may be heard and the agency informed of the impact of its proposed action. Such a proceeding assures that the agency has deliberated on the matter and has been informed of the relevant considerations in the discharge of its policy-making functions. *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111 (1943). It also assures the persons affected an opportunity to be heard. These factors are among the reasons for judicial deference to administrative judgment. *Cf., Columbia Broadcasting System* v. *F.C.C.,* 311 U.S. 132 (1940). Where, as here, there is no rulemaking proceeding, only the issuance of an amendment without discussion or explanation, it is appropriate for a court to look more closely at what the agency has done.

The Secretary's interpretation of statutory language at any time is not conclusive, though of course it has weight in judicial consideration. The weight depends, as the Court has said, on the generality or specificity of the statutory authorization:

> The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called,

> its details. But when Congress wants to give wide discretion it uses broad language. *Addison* v. *Holly Hill Fruit Co., supra,* at 616.

The term "making a crop" is surely not "broad language" conveying a "wide discretion" as are such guides as "the public interest, convenience and necessity" and what is "just and reasonable." See *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.,* 289 U.S. 266 (1933); *Tagg Brothers & Moorehead* v. *United States,* 280 U.S. 420 (1930); 1 K. Davis, *Administrative Law* §2.03 (1958). Nor is the statutory term in question a phrase of common English usage which would be susceptible to many variations in application. Compare *Cargo Carriers* v. *Snyder,* 104 F. Supp. 258 (D.D.C. 1952). Rather, as we shall show *infra,* the term "making a crop" is one of narrow signification limited by judicial and administrative constructions of long standing. It is not a term Congress would have chosen to authorize the Secretary to make and revise policy within wide discretion on the assignability of price supports and diversion payments. Thus, his action cannot be supported on the grounds that he "was entrusted . . . with the responsibility of selecting the means of achieving the statutory policy." Compare *American Power & Light Co.* v. *SEC,* 329 U.S. 90, 112 (1946).

Nor is this a case where the Secretary can claim comfort in the thought that administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently when they are yet untried and new." *Norwegian Nitrogen Prods. Co.* v. *United States,* 288 U.S. 294, 315

(1933); *Udall* v. *Tallman*, 380 U.S. 1, 11 (1965); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940). It is true that the 1965 Act was a new law, but it is the administrative interpretation of aged §8(g) that has been changed, and is complained of herein—not any administrative ruling issued under the 1965 Act. Any deference accorded by maxim should go to those who first construed §8(g) in 1938, almost immediately upon its enactment. Secondly, the presupposition of Congressional incorporation of one statute into another is precisely that the law is *not* "untried and new." To allow an administrator special latitude in redefining the basic terms of the incorporated statute would be to undercut Congress's action. Congress knew an approach works or worked once before with satisfactory results, and it directed that the same thing be done again.

If, as we shall show, the Secretary's definition of "making a crop" is contrary to Congressional understanding of the term, this Court must strike it down.

B. The Legislative, Administrative and Common Law Meaning of the Term "Making a Crop" Precludes Defining It to Include Payment of Rent for Land.

Assignment rights under 7 U.S.C. §1444(d)(13) are established by incorporation of the "provisions" of §8(g). Therefore, in the absence of any indication to the contrary in the legislative history of the 1965 act, it is to §8(g) and its legislative and administrative history that the Court must look in ascertaining the permissible meanings of "making a crop." Respondents' suggestion (Respondents' Brief in Opposition, p. 15) that the Congressional purposes underlying 7 U.S.C. §1444(d)(13) can be ascertained with-

out reference to the history of §8(g) and the regulations issued thereunder is as erroneous in this context as in the "standing" context. Whether or not the Soil Conservation and Domestic Allotment Act was "moribund" as regards assignments is irrelevant. What is important is that Congress in looking for a legislative mechanism to authorize limited assignments of farm subsidies, in the context of a program once again authorizing special protection for tenants and sharecroppers, 7 U.S.C. §1444(d)(10), decided to adopt the same compromise solution that had earned Congressional approval twenty-seven years earlier.

Turning again to the history of §8(g), Petitioners have shown in Part I of this brief that the law was passed in Congress only as a result of a compromise that imposed, for the benefit of small farmers, substantial limits on their power to assign, including the limit that the assignment be made to finance "making a crop." The phrase, though it is simple English, may not be dismissed as a colloquial equivalent of "to grow a crop." The term originally meant to prepare a crop for use or storage at the last stage of development.* See *Texas & Pacific Ry. Co.* v. *Bayliss,* 62 Tex. 570, 574 (Sup. Tex. 1884); *Driver* v. *Maxwell,* 56 Ga. 11, 20 (Sup. Ct. Ga. 1876) (dissenting opinion). A more recent and broader usage is that given in the Dictionary of Agricultural and Allied Terminology, at 643 (J. Winburne ed. 1962): "to plow and fit land, to plant seed, to cultivate, to harvest, etc." In all usages, however, the term deals with the farmer in the field growing his crop, not negotiating for his farm. Undoubtedly Congress was familiar with this technical usage or else it would not have chosen

* For example, "to make hay" meant to turn cut hay for drying by the sun in the field. Oxford English Dictionary M-64 (1908).

the term, as it so plainly did, as a device to restrict assignments.

Upon enactment of §8(g), it was incumbent upon the Secretary to issue a definition of making a crop. He did so in the following "Instructions Relating to Assignments and Use of ACP-69":

> A. To finance making a crop.—A payment which may be made to a farmer (hereinafter referred to as the "assignor") under section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advances to finance making a crop. To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (2) to provide food, clothing, and other necessities required by the assignor or persons dependent upon the assignor for the purpose of making a crop; or (3) to finance the carrying-out of soil-building of range-building practices. *Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity rent for a farm.* (emphasis added)

Substantially this definition, including the express prohibition against assignment for payment of cash or fixed commodity rent, was carried forward and formally published in 1955, 20 Fed. Reg. 6511.

Whether the Secretary's 1938 definition of making a crop be thought a broad reading consistent with the tech-

nical usage of the term, or instead a definition which departed from that usage better to effectuate the Congressional purposes which led to §8g's enactment is of no consequence.* The important consideration is that the Secretary recognized that assignment of payments for cash rent was not within the Congressional understanding of the limits imposed by the term "to make crop." The problem dealt with then, as now, was to provide some credit to economically weak farmers without its dissipation by the controlling economic figure in the setting, the landlord.

Undoubtedly, even without the power to assign, tenants are still potential victims of landowners' power over them. There are many ways to utilize economic dominance. The theory of the federal agriculture programs, however, has not been directly to reform one-sided economic relationships in the rural South but rather to prohibit landowners' manipulation of those traditional relationships so as to deprive small producers of their fair share of federal benefits. This approach is explicit in §§8(e) and (f) of the

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* The question is whether the technical agricultural usage of the term "making a crop" would include purchase of the necessaries of life and the performance of conservation practices. Assignment for these purposes was permitted by the Secretary from the outset. Purchase of the farmers' food and clothing is an expense of labor, and thus properly part of making a crop. The expense of soil and conservation practices are also within the agricultural meaning of the phrase. They are recurrent expenses necessary to protect both crops, and the land. This was the lesson of the dust bowls, and it led to enactment of the Soil Conservation and Domestic Allotment Act.

Without regard to the technical meaning of the phrase, the then Secretary's 1938 action can be justified as well within the purposes which Congress intended to serve by using the phrase "making a crop." The 1966 regulation does not conform to the technical meaning of "making a crop"; nor can it be thought a permissible variation designed to accomplish Congressional intent.

Soil Conservation and Domestic Allotment Act, 16 U.S.C. §§590h(e), (f), enacted at the same time as §8(g), and implicit, as recognized by the Secretary's regulations issued under 7 U.S.C. §1444(d)(10), in the Upland Cotton Program. The well-settled restriction on assignability for rent was part and parcel of the same Congressional approach. It deprived the landowner of a mechanism for avoiding the burden he traditionally assumes to collect rent at the end rather than the beginning of the year by usurping the credit given to tenant farmers in the federal program.

With this background, we come to ascertaining the Congressional will as of the time the Food and Agriculture Act of 1965 was enacted. As we have said, nothing whatever suggests that 7 U.S.C. §1444(d)(13) was intended to serve different purposes than §8(g) or that "making a crop" was to have a different meaning. Common sense suggests that if this had been intended, Congress would have redrafted the provision. Surely the contemporaneous enactment of 7 U.S.C. §1444(d)(10) establishes that Congress was still well aware of the need of tenant farmers for special protection under the law. Furthermore, such legislative history as there is indicates that Congress was actually aware that "making a crop" did not include paying rent. The Conference Report on the 1965 act states:

> Cotton farmers may assign their direct price support and diversion payments to private lending agencies in obtaining production loans.
>
> Confer. Rep. No. 1123, 89th Cong. 1st Sess. [1965 U.S. Code Cong. & Admin. News 5966]

"Production loans" are not loans for rent, and loans for rent are not usually made by private lending agencies.

Coupled with some express evidence of Congressional intent is the undeniable and eloquent fact that the impermissibility of assignments for rent had been crystal clear for 27 years prior to the 1965 act. A federal regulation unequivocally and emphatically expressed the Secretary's settled interpretation of "to finance making a crop," and rent assignments were barred by it. It follows from a basic principle of statutory construction that Congress recognized, approved and adopted this construction by enacting in another context the language in question. *Wyoming* v. *United States*, 310 F.2d 566, 580 (10th Circ. 1962). Accord, *National Lead Co.* v. *United States*, 252 U.S. 140, 146 (1920). See *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272 (1966); *Cammareno* v. *United States*, 358 U.S. 498 (1959); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956).

Undoubtedly this principle of statutory construction, like most others, is not to be woodenly applied to all situations. The interactions of Congressional and administrative processes are too complex to resolve automatically by reference to the generalities of maxims. But the principle has special force where, as here, Congress does not bother to repeat statutory language but rather expressly adopts and incorporates another definition by reference. In 7 U.S.C. §1444(d)(13) Congress tersely made "the provisions of Section 8(g) . . . apply to payments under this subsection." 7 U.S.C. Sec. 1444(d)(13). This cursory treatment evinces rare confidence in the clarity and settled character of statutory "provisions." The use of such an indefinite term as "provisions" to refer to as cryptic a statute as §8(g) implicitly recognizes that its provisions were spelled out in regulations. Had Congress meant to

authorize the Secretary to begin again, and to give the assignment right in the Upland Cotton Program a life of its own, independent of the history of Section 8(g), Congress would have enacted a newly drafted assignment provision.

Of course, Congress does not legislate by incorporating short-hand at the risk of freezing all current administrative interpretation into law. It is a question of legislative intent in each case. Here the Congressional ratification test of intent is perfectly consistent with Congressional policy, which is that of benevolence toward small farmers. There is no reason to suppose that Congress would acquiesce for twenty-seven years in an administrative ruling that improperly restricted the freedom of the tenant farmer to secure the financing of his crop with his subsidy payment. On the contrary, in the same Food and Agriculture Act in which it gave such casual attention to the right of assignment, Congress by specific provision granted in the Upland Cotton Program the right to sell or lease one's allotment. 7 U.S.C. §1305. In contrast to this unambiguous expression of intent, §1444(d)(13) reflects the well established understanding that assignments to finance tenant farmers' "making a crop" does not include assignments to secure the payment of rent. Congress did not alter the meaning of the phrase. Accordingly, when the Secretary re-defined "to finance making a crop" in February, 1966, 31 Fed. Reg. 2815, to allow cash payments for rent, he acted in contravention of the Congressionally-determined meaning of the phrase. His regulation is therefore invalid.

Petitioners' position is in no way undermined by the 1966 Amendment to Section 8(g), 80 Stat. §1167, as

amended 16 U.S.C. §590h(g), as will be seen from a review of the circumstances surrounding this amendment. The amendment, enacted after the issuance of the regulations complained of herein, was principally designed to render more convenient the witnessing of assignments. It also marginally broadens the purposes for which assignments may be made. Respondents argue that Congressional acquiescence in the changed definition of "making a crop" can be inferred from this amendment and accompanying silence as to the new regulations. Respondents' Brief in Opposition, p. 15, n. 10.

No such inference is warranted, even under the broadest notions of tacit acquiescence—the sounds of silence. The 1966 amendment to Section 8(g) originated as H.R. 13863. As introduced by Congressman Gathings, 112 Cong. Rec. 6570 (1966), it dealt only with simplification of the manner of making an assignment. Prior to 1966 an assignment had to be witnessed by a member of the County Committee, and "the farmer, in many cases, was required to make several trips to his local committee office before he could find a member of the committee present to witness his signature of the assignment." H.R. Rep. No. 2223, 89th Cong. 2nd Sess. (1966). H.R. 13863 would have done nothing more than provide for simplifying the assignment process by authorizing more people to serve as witnesses. The bill was referred to the Department of Agriculture for its suggestions. The Department agreed that the change was desirable, but it also requested other changes, including expansion of "the purposes for which an assignment is authorized to include handling or marketing an agricultural commodity or performing a conservation practice." Letter of John Schnittker to Harold Cooley, August

23, 1966, H.R. Rep. No. 2223, 89th Cong. 2d Sess. (1966). Assignments for conservation practices had always been expressly allowed in the long-standing Department regulation, and assignments for marketing, although not mentioned in the regulation, had been given effect by some local committees as within the meaning of "making a crop." Neither of these clarifications touch upon any area in which there is potential for abuse for tenant farmers. They were not controversial.

A clean bill, H.R. 17588, incorporating the Department's proposals, was then reported out by the House Committee on Agriculture. It passed without substantial discussion in both the House and Senate. In both chambers of Congress, the sponsor of the bill expressly stated that its purposes were only to ease the technical aspects of the assignment process. 112 Cong. Rec. 27077, 27990 (1966).

Further, nothing in the legislative history of the 1966 amendment to Section 8(g) indicates that the Department of Agriculture alerted Congressional attention to the fact that it had, a few months before, changed the settled interpretation of "making a crop" to deprive tenant farmers of the substantial protections they had had. There is plainly no basis for assuming that Congressional leaders, or the Congress, knew of these changes on their own, since the challenged regulation had been issued shortly before, and its impact had not yet been fully recognized by tenant farmers. What is important to note is that the Department did *not* seek express legislative authorization for a major change in policy that had stood for nearly thirty years, even though it was given carte blanche to suggest an overall redrafting of Section 8g's provisions. In response to this invitation, the Department urged Congress to specify that

assignments could be made for conservation practices, although the Secretary had always construed such practices to be part of "making a crop." See "Instructions Relating to Assignments," *supra.* It also urged the explicit inclusion of assignments for handling or marketing an agricultural commodity. Both of these requested specifications were consonant with prevailing practices, and, most critically, the interest of tenant farmers. Why the Department thought it appropriate to seek express Congressional approval of assignments for these purposes, one of which it had authorized for thirty years, while not seeking approval of a major policy reversal made but a few months before, can only be left to surmise. But the Department's submissions and omissions do not lend support to Congress' awareness, no less approval, of this significant regulatory change.

In these circumstances, there can be no affirmation of the Secretary's new regulation on a theory that Congress has silently approved the change in regulations to include payment of cash rent as a part of "making a crop." The District of Columbia Circuit recently dealt with a strikingly similar situation in *Freeman* v. *Seligson,* 405 F. 2d 1326 (1968), in which the Secretary of Agriculture argued that Congressional approval of his long-standing but controversial interpretation of §8 of the Commodity Exchange Act, 7 U.S.C. §12, could be inferred from Congressional silence, particularly insofar as Congress had recently amended the law in question. Holding against the Secretary, the majority of the Court rejected this simplistic approach, and indeed turned the argument against him. The Court noted:

> We close by reference to the recent statute wherein Congress enacted numerous amendments to the Commodity Exchange Act, including Section 8. These amendments were proposed by the Department of Agriculture, and several were put forth with the explicit purpose of providing express statutory confirmation of long-standing interpretations of the Secretary. Yet [despite a recent lower court rejection of the Secretary's interpretation], no attempt was made to seek Congressional confirmation of the Secretary's approach. This kind of consideration is neither decisive nor a makeweight. It tends to reinforce the conclusion that we have reached. . . . 405 F. 2d at 1352.

In this case too the Secretary sought confirmation of a long-standing rule, while, for whatever reasons, avoiding submitting for Congressional consideration an obviously more controversial matter. Petitioners submit that the only inference that may be drawn from the 1966 amendment to 16 U.S.C. §590h(g) is that Congress was in accord with the "only purpose of the bill," to "make it a little more convenient to make the assignments that are currently made by the thousands during the year." 112 Cong. Rec. 27077 (1966)

C. The Secretary's Regulation Is Internally Inconsistent, and Reflects an Incorrect View of His Role in Construing the Act.

We have shown that the phrase "making a crop" is an agricultural term of art relating to working land to produce crops. We do not believe it can fairly be stretched to cover renting land. However the Secretary has not chosen *any* fixed agricultural meaning of the term. Thus, he pro-

vides in the challenged regulation, 7 C.F.R. 709.3(b) (1968) that:

> "to finance making a crop means . . . the payment of cash rent for land used therefor;"

while 7 C.F.R. §709.3(c) informs us:

> "Nothing contained herein shall be construed to authorize an assignment given to secure . . . the payment of the whole or any part of a fixed commodity rent for a farm."

If obtaining land is part of "making a crop" on the theory that it is a factor of production, then it should be irrelevant whether the rent for such land is expressed in terms of cash or a fixed commodity. The assignment to secure cash rent or fixed commodity rent is or is not to finance "making a crop." Certainly, the purchase of seeds or a rake remains a part of "making a crop" regardless of whether the purchase price is expressed in terms of cash or goods. Why is land different?* Why is the old rule changed in one respect and not the other?

Because the Department of Agriculture does not hold rulemaking hearings, or even issue explanations of its ruling on permissible assignments, Petitioners can only guess as to what considerations led the Secretary to his reversal of the Department's long settled position on assignment for cash rent. Probably of key importance is that landowners

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* If the distinction is justifiable, it is only on a theory which admits that the restrictions on assignments were, in the 1965 act, intended to benefit poor farmers.

have been hurt by the drop in the loan rate on cotton to 21 cents a pound.* Therefore to help them out, the Secretary gave them a mechanism by which they can secure large amounts of additional credit at the beginning of the year. Meanwhile, as a bonus for tenants the Secretary issued regulations, as he was charged to do by 7 U.S.C. §1444(d)(10), protecting them against other forms of abuses. As the Government characterizes this exercise:

> "[W]e believe the Secretary's regulations . . . *viewed as a whole,* adequately carry out his statutory duty to 'provide adequate safeguards to protect the interests of tenants and sharecroppers.'" Respondents' Brief in Opposition, 16. [Emphasis added.]

Something was done for the tenants; something was done for landowners. The Secretary giveth, and the Secretary taketh away.

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*Instead of direct subsidy payments, farmers have the option of receiving government loans ("price support loans") against their crop, to be repaid when the crop is actually sold—this enables them to store the crop at harvest time until the market is better and still receive a support payment at the time of harvesting. Prior to the 1965 legislation only price support loans were available to farmers, at a rate of approximately $.30 per pound. The Act of 1965 reduced this rate to a figure calculated on the basis of the world price for cotton, $.21 per pound, with an additional $.09 per pound available for cotton produced for domestic markets, which was to be at least 65 per cent of their total production. In addition, for the first time in 1965 additional payments were authorized for diversion of farm land from cotton production to conservation uses. The general purposes of the Food and Agricultural Act of 1965, however, remain the same as the general purposes of all major agricultural legislation since the 1930's: curtailment of production and concurrent income maintenance for farmers. In this respect, then, the 1965 Act is in no way "new and different," as Respondents allege. Respondents' Brief in Opposition, p. 15.

Petitioners submit that this is administrative lawlessness. Congress does not authorize the Secretary to administer the programs it creates on an *ad hoc* basis, picking and choosing here and there to create an overall policy that the Secretary deems economically fair. Compromises obviously have to be made between landowner and tenant interests, but these are to be made primarily by Congress, and only by the Secretary insofar as Congress delegated that power to him. Obviously 7 U.S.C. §1444(d)(13) is not such a delegation and it cannot be used as a balancing device between interests of the two groups. It was intended solely for the benefit of poor farmers in need of credit, not for landowners in search of quicker rent collections. The Secretary may not emasculate the specific statute in search of some broader policy he deems wise.

As was said by this Court in an analogous context, "the Act's provisions are not indefinitely elastic, content-free forms to be shaped in whatever manner the Board might think best conforms to the proper balance of bargaining power." *American Shipbuilders Co.* v. *N.L.R.B.*, 380 U.S. 300, 310 (1965). *See also, N.L.R.B.* v. *Insurance Agents*, 361 U.S. 477 (1960).

Even if Congress did not intend in 1965 to "freeze" the definition of "making a crop," the term is plainly intended as a limitation for the protection of tenants. The Secretary may not redefine it to expose them to the very sorts of risks Congress guarded against.

III.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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EXHIBIT A

Statute and Regulations Involved

Section 402 of the Food and Agriculture Act of 1965, 79 Stat. 1194, 7 U.S.C. §1444(d)(13) (Supp. III) provides:

> The provisions of section 590h(g) of Title 16 [8g of the Soil Conservation and Domestic Allotment Act, as amended] (relating to the assignment of payments) shall also apply to payments under this [program].
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> • • • • •

Section 8g of the Soil Conservation and Domestic Allotment Act, 52 Stat. 35, 205 (1938), as amended, 16 U.S.C. §590h(g) (Supp. III) (80 Stat. 1167, Nov. 2, 1966), provides:

> A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances to finance making a crop, *handling or marketing an agricultural commodity, or performing a conservation practice.*•
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> • • • • •

U. S. Department of Agriculture, "Instructions relating to assignments and use of Form ACP-69" (1938) provided:

> A. To finance making a crop.—A payment which may be made to a farmer (hereinafter referred to as the "assignor") under section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advances to finance making a crop. To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (2) to provide food, clothing, and other necessities required by the assignor or persons dependent

• The italicized language was added by the amendment of November 2, 1966.

upon the assignor for the purpose of making a crop; or (3) to finance the carrying-out of soil-building or range-building practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity rent for a farm.

20 Fed. Reg. 6511, 6512 (Sept. 3, 1955), as amended by 31 Fed. Reg. 2815 (Feb. 17, 1966), provided at the time this action was brought:

Payment may be assigned to finance making a crop. A payment which may be made to a farmer • • • under section 8 of the Soil Conservation and Domestic Allotment Act as amended, may be assigned only as security for cash or advances to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor *and the payment of cash rent for land therefor;* (b) to provide food, clothing, and other necessities required by the assignor or persons dependent on the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a [cash or] fixed commodity rent for a farm.*

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* The italicized language was added and the bracketed language deleted by the amendment of February 17, 1966.

32 Fed. Reg. 14921 (Oct. 28, 1967), 7 C.F.R. 709.3 (1968) now provides:

Purposes for which a payment may be assigned.

(a) A payment which may be made to a producer under any program to which this part is applicable may be assigned only as security for cash or advances to finance making a crop, handling or marketing an agricultural commodity, or performing a conservation practice, for the current crop year. No assignment may be made to secure or pay any preexisting indebtedness of any nature whatsoever.

(b) To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor and the payment of cash rent for land used therefor, or (2) to provide food, clothing, and other necessities required by the producer or persons dependent upon him.

(c) Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm.